

A Constitutional Right to a High-Quality Public Education

By Nina Rees

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Key Points

- There are three reasons conservatives should support making access to a high-quality public education a constitutionally protected civil right.
 - First, a constitutional right to a high-quality public education should not confer a right to sue for individual services.
 - Second, elected governors and legislators, not judges, would continue to make education policy decisions in accordance with a constitutional right to a high-quality public education.
 - Third, a constitutionally protected right to a high-quality public education could broaden policymakers' focus to include not just spending and inputs but also outcomes.
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Windows of transformational change often open after periods of national upheaval. COVID-19 highlighted the vast divide between schools and students that could seamlessly shift to online, home-based education and those that couldn't. Students in the bottom 10 percent of the socioeconomic distribution are already up to four years behind those in the top 10 percent,¹ and the effects of the pandemic will widen the gap.

It's easy to look at COVID-19 as a call to action to give every student access to a Chromebook and Wi-Fi at home. But the real imperative is to address the persistent underlying reasons our education system has prevented generations of students from low-income families and students of color from receiving a high-quality education. Quite simply, the education system, organized to protect adults' interests, has failed students. Decades of institutional reform efforts have failed to make consistently high-quality schools available to all students. To remedy this injustice, we need to shift the balance of power away from the education establishment toward families. We

can do that by making access to a high-quality public education a constitutionally protected civil right.

Having worked at the US Department of Education during the implementation of No Child Left Behind (NCLB), I can attest that the endless struggle between the federal government and the states often leaves education policy mired in half measures and recriminations. The federal government has historically resented states that don't seem to be focused enough on student outcomes, while state governments resent the federal government for intruding on state prerogatives with rigid expectations and unfunded mandates. This was true under NCLB and continued under the Obama administration's Race to the Top program.

Now that the Every Student Succeeds Act has sent power back to states, students in states with innovative leaders committed to a high-quality education stand to benefit. But in states where governors are either lethargic or captive to the education bureaucracy, students will not be well served by the federal government's retreat. These students and their parents need a mechanism to force state leaders to focus

on improving student outcomes rather than placating special interests. A state constitutional right to a high-quality public education can be that mechanism.

Some conservatives will balk at the idea of enshrining a right to a high-quality public education in state constitutions. The objections are known: concerns about unleashing waves of lawsuits from self-styled children's lobbies, unions, and even school districts; the potential that judges will become education policymakers; and the fear that the only way to satisfy such an educational right is to push spending and taxes ever higher.

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Yet well-crafted constitutional provisions would answer these concerns and help correct the flow of policy in recent decades that has given more power to the educational establishment while stymieing parents' efforts to direct their children's education. Here are three reasons conservatives ought to embrace making high-quality public education a constitutional right.

First, a constitutional right to a high-quality public education should not confer a right to sue for individual services, as exists with the Individuals with Disabilities Education Act. Rather, it should ensure that students who are not receiving a quality education can band together (with their parents) to demand remedies through the legislature. This would give students and parents more power to hold government accountable for ensuring education policy decisions prioritize the needs of students rather than the needs of bureaucrats, special interest groups, and other entrenched operators. And it would make students and parents the primary stakeholders.

Second, elected governors and legislators, not judges, would continue to make education policy decisions in accordance with a constitutional right to a high-quality public education. While some judges would undoubtedly be tempted to take on a more activist role, new constitutional provisions

on educational quality should empower them to make only binary rulings, either upholding a law as constitutional or invalidating it as unconstitutionally harmful to students. Courts have played this role effectively for more than a century in the context of equal protection jurisprudence. If a law were found unconstitutional, legislators and governors, not judges, would craft the replacement policies.

Third, a constitutionally protected right to a high-quality public education could broaden policymakers' focus to include not just spending and inputs but also outcomes. The tendency now is to assume that higher spending is a victory for students without determining whether spending in some areas produces better returns for students than spending in other areas does. That would change if we established an explicit mandate for quality. As long as achievement gaps persist, policymakers would be incentivized—even required—to try new approaches to education that chip away at those gaps. This could mean more support for policies such as educational choice and innovation and less support for policies such as union seniority rules that reward teachers for years on the job rather than results in the classroom.

Bipartisan coalitions in California and Minnesota are now working to include a constitutional right to a high-quality public education in their state constitutions. One leader of the Minnesota effort is Minneapolis Federal Reserve Bank President Neel Kashkari, a former Bush administration official and Republican candidate for governor of California. The proposed Minnesota amendment² enjoys broad bipartisan polling support, including 65 percent approval among Republicans.³

More conservatives should lead or join such efforts to help shape the details of any constitutional amendments that are put on state ballots and, ultimately, to ensure that students' and parents' interests take precedence in education policymaking.

When the COVID-19 crisis is over, more money will be spent on educational technology in communities across America. That will be a good investment in children. But simply adding more resources to flawed systems won't guarantee student success. We need *real* change to improve educational outcomes for students. We can achieve it by giving students and parents the power to insist that legislators and governors make high-quality public education a priority.

About the Author

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Notes

1. Eric A. Hanushek et al., “The Achievement Gap Fails to Close: Half Century of Testing Shows Persistent Divide Between Haves and Have-Nots,” Hoover Institution, Summer 2019, <http://hanushek.stanford.edu/publications/achievement-gap-fails-close-half-century-testing-shows-persistent-divide-between-haves>.
2. Federal Reserve Bank of Minneapolis, “Closing Minnesota’s Achievement Gaps: Why a Constitutional Amendment?,” <https://www.minneapolisfed.org/policy/education-achievement-gaps/why-a-constitutional-amendment>.
3. Our Children, “RELEASE: Nearly Four out of Five Minnesotans Support Placing a Constitutional Amendment Guaranteeing a Quality Public Education on the November Ballot,” press release, March 6, 2020, <https://ourchildrenmn.com/release-nearly-four-out-of-five-minnesotans-support-placing-a-constitutional-amendment-guaranteeing-a-quality-public-education-on-the-november-ballot/>.

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